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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1991

MICHAEL TOLOKAN, JR., Individually and d/b/a JOE AND MIKE'S SERVICE STATION,

Petitioners,

v.

MOBIL OIL CORPORATION,

Respondent.

On Writ of Certiorari In The United States Court of Appeals for the Second Circuit

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BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

1. May a discriminating seller avoid this Court's holding in *Texaco, Inc. v. Hasbrouck*, 110 S. Ct. 2535 (1990), condemning arbitrary discounts and classes of trade, by alleging a meeting competition defense which is itself predicated upon an arbitrary classification of purchasers, which classification was rejected by the jury?

2. May a meeting competition defense be established under the Federal *Robinson-Patman Act* (15 U.S.C. §13(b)) without any evidence identifying competitors, competitive offers, or any prices of unidentified competitors?

3. May a meeting competition defense be established when the only pricing evidence presented relates to a functional level of competition that is irrelevant to the discrimination?

4. May a discriminating seller properly claim to be "meeting competition" when the prices allegedly being "met" are established under the system of pricing condemned by *Hasbrouck*?

5. Is the existence of antitrust injury properly presumed where competition is keen, profit margins are small, the discrimination is relatively large and admitted to be competitively significant, and the discrimination has existed continually for many years?

6. Was the jury's finding regarding antitrust injury having been suffered by the Petitioner fatally flawed by the District Court's erroneous submission of the meeting competition defense to the jury?

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LIST OF PARTIES

The parties to the proceedings below, and Petitioners herein, are: Michael Tolokan, Jr. individually, and d/b/a Joe and Mike's Service Station and J & M, Inc. Petitioners are referred to collectively as "Tolokan".

Party to the proceedings below, and Respondent herein, is the Mobil Oil Corporation.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

MICHAEL TOLOKAN, JR., individually and
d/b/a JOE AND MIKE'S SERVICE STATION,

Petitioners,

v.

MOBIL OIL CORPORATION,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is reprinted within the separate Appendix as Appendix A. The Verdict Form of the District Court for the District of Connecticut is

reprinted as Appendix B.[1]

JURISDICTION

The Opinion of the Court of Appeals for the Second Circuit was entered on September 16, 1991. This Court has jurisdiction to review the judgment below by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal *Robinson-Patman Act*, 15 U.S.C. § 13(a) *et. seq.* Relevant portions of the *Robinson-Patman Act* are reprinted as Appendix C.

Clayton Act, § 4, 15 U.S.C. § 15. Relevant portions of the *Clayton Act* are reprinted as Appendix D.

Federal *Rules of Civil Procedure*, Rules 50(a), 50(b)

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[1] References to "A" are to Appendix A, the Court of Appeals decision; references to "B" are to Appendix B, the District Court Jury Verdict Form; references to "Tr." are to the transcript record before the District Court; references to "E.R." are to the Excerpts of Record in the Court of Appeals Appendix; references to "Ex." are to those exhibits entered into evidence before the District Court.

and Rule 59. Relevant portions of Rules 50 and 59 are reprinted as Appendix E.

STATEMENT OF THE CASE

This case raises fundamental issues of importance with respect to the proper interpretation and application of the antitrust laws, particularly the *Robinson-Patman Act* (price discrimination and meeting competition defense), and the *Clayton Act § 4* (antitrust injury), and an attempt by a discriminating seller to circumvent this Court's recent holding in *Texaco v. Hasbrouck, supra*.

First, may a seller discriminating between two buyers, without regard to any legitimate functional difference or cost justification (contrary to *Hasbrouck*), avoid antitrust liability by now claiming to be "meeting" the prices of competitors, which prices themselves are established pursuant to the very same arbitrary system of buyer classification condemned by *Hasbrouck*?

Second, may discriminating sellers, with industry incentives toward discrimination, insulate themselves (and hence each other) from antitrust liability, which should result from the use of a pricing system based on

an arbitrary classification of purchasers, by generally claiming that they are doing so to meet the very same arbitrary pricing practices and systems of others?

Third, may a meeting competition defense under the *Robinson-Patman Act* be established without the identification of competitors, without evidence of competitive prices, and without evidence of competitive offers available to a favored buyer at any point in time?

Finally, this case calls upon the Court to decide whether the erroneous submission of such a defense to a jury impinges upon the jury's proper application of the antitrust laws, including the presumption of antitrust injury resulting from a violation of the law. In this regard, it will be important for the Court to state whether the presumption and inference of injury, appropriate in antitrust cases involving significant and lengthy price differences in highly competitive markets with low profit margins, is equally applicable to situations where the favored buyer does not undercut the disfavored buyer in price, but rather, is able to use

the higher profits derived from the discrimination to maximize its profitability while the disfavored buyer is prevented from earning and using such enhanced pricing or profits to improve its competitive position (and hence competition) in the marketplace.

A. *STATEMENT OF FACTS*

The Petitioners (collectively referred to as "Tolokan") owned and operated a gasoline service station on Route 1 in Guilford, Connecticut. During the relevant time period of February 23, 1981 through September 2, 1988, Tolokan purchased his gasoline exclusively from the Respondent ("Mobil"), pursuant to a gasoline supply agreement, and operated his service station exclusively under the "Mobil" brandname. Tolokan owned the property upon which his station was located, as well as the station facility itself. Mobil delivered the gasoline it sold to Tolokan directly to his station.

Over the same time period, another Mobil branded retail gasoline station was located

approximately one mile from the Tolokan station, also on Route 1 in Guilford. This service station facility was owned and operated directly by Aldin Associates ("Aldin"). The Aldin station also purchased its gasoline exclusively from Mobil during the relevant time period, and sold that gasoline to the public under the "Mobil" trademark.

Based upon these facts, the jury found that the Tolokan and Aldin stations were in competition with one another between 1981 and 1988, and that they did business in competition with one another at the same retail functional level, i.e. the jury rejected Mobil's claim that Aldin was a distributor/wholesaler. (Verdict Form, App. B, Questions 2 and 3.)

It was undisputed that the Mobil gasoline sold by Mobil to Tolokan and to Aldin was of like grade and quality, was sold in interstate commerce, and that the sales in question were commensurate in time with one another. However, over the entire damages time period of approximately nine years Mobil sold its gasoline to

the Aldin station at a price averaging five cents less per gallon for each grade of gasoline. (January 22 Tr. at 66, 97.) Even Mobil's expert admitted that the acknowledged five cent discrimination was "competitively significant". (January 22 Tr. at 100.) At times, Mobil charged Tolokan as much as 26.4 cents per gallon more than it charged Aldin. (P. Ex. 15, Prices of March 8, 1986.)

Based upon these facts, the jury found that Mobil had charged Tolokan a higher price for Mobil gasoline than it charged Aldin for the identical product and that, as a result, competition may have been harmed. (Verdict Form, App. B, Questions 1 and 4.)

In defense of its discriminatory pricing, Mobil claimed that its lower prices to Aldin were protected by the meeting competition defense of the *Robinson-Patman Act*. However, Mobil presented no evidence whatsoever regarding:

- the identity of alleged "competitors";
- prices of those unidentified

"competitors" at any time during the relevant nine-year damages period;

- evidence regarding the existence of any relevant competitive offers to Aldin;[2]

- evidence regarding the availability of such competitive products to Aldin.

Rather, Mobil's "meeting competition defense" was based entirely upon testimony that once Mobil had unilaterally determined that a purchaser (i.e. Aldin) was to be considered within the favored "distributor class of trade", it would receive the significantly favored prices attributable to that arbitrary characterization. Mobil presented no evidence identifying any "functions" performed by such a favored buyer, and no evidence regarding any quantification of the value of any such alleged "functions", or "cost justification", in legitimization of the substantial discounts afforded to

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[2] The only document that could possibly be considered to be a competitive offer (Ex. KKK) was conceded by Mobil to be irrelevant. (January 15 Tr. at 29-30.)

those characterized by Mobil as "distributors". According to Mobil, such factors were "irrelevant" to its pricing practices. (Testimony of Mobil's pricing manager, Pryor, January 18 Tr. at 118-120, 124.)

It was also irrelevant to Mobil, in setting its prices, whether all, or a portion of the lower priced gasoline sold to an entity arbitrarily considered by Mobil to be within the "distributor class of trade", was thereafter sold directly at retail by the favored buyer who performed no actual distributional functions. (January 18 Tr. at 69, 127, 138.)

Mobil's "meeting competition" defense was therefore wholly based upon Mr. Pryor's testimony that it was his job at Mobil to review generally the prices which other refiners posted as their "jobber terminal price" (i.e. prices to distributors) at various petroleum terminals around the country, without regard to whether or not any distributional functions were actually performed by this favored "class of trade". (January 18 Tr. at 58-59, 76-78, 86-87, 93-98, 110-114, 118-120, 124:

"*I don't analyze the distributors cost, couldn't care, frankly.*", lines 6-7.)[3]

Moreover, Mobil's "meeting competition defense", and all evidence presented in support of that defense, related only to Mobil's pricing practices, and those of its purported "competitors", at the *wholesale/distributor functional level.* Mobil's defense was therefore predicated upon a factual finding by the jury that the favored buyer, Aldin, was actually a distributor/wholesaler, rather than merely arbitrarily characterized as such by Mobil. However, the jury rejected Mobil's designation, finding that Aldin was a *retailer* operating at the same *retail* functional level as Tolokan, rather than a wholesaler/distributor. (Verdict

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[3] Although Mobil's pricing manager stated that he reviewed Mobil's pricing with respect to these unidentified "competitors", confirming that such information was apparently available to Mobil when he testified, such evidence was not provided by summary or otherwise at the time of trial. (January 18 Tr. at 96-98, 137.)

Form, App. B, Question 3.)[4]

At the conclusion of the presentation of Mobil's case, Tolokan moved for a directed verdict regarding Mobil's meeting competition defense. (E.R. 88-89.) Tolokan based this motion upon the fact that:

1. Mobil had failed to meet its burden of proof regarding the existence of facts necessary to establish a meeting competition defense pursuant to 15 U.S.C. 13(b); and

2. Any evidence supporting the existence of a meeting competition defense applied only to the "distributor class of trade", which was wholly irrelevant to Mobil's sales to Aldin, since the facts conclusively showed that Aldin was a retailer, not a distributor or wholesaler.[5]

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[4] The sole "function" performed by Aldin not performed by Tolokan (because he was not permitted to do so) was the delivery function to its own retail station. However, Mobil provided no evidence reflecting an appropriate value attributable to the performance of such a function. The jury therefore found that the lower price offered to Aldin was in no way cost justified. (Verdict Form, App. B, Question 7.)

[5] That Aldin was a retailer, not a distributor, was later confirmed by the jury's finding. (Verdict Form, App. B, Question 3.)

The Court denied Tolokan's motion, and allowed the jury to consider Mobil's meeting competition defense.

Aditionally, although even Mobil's expert admitted that the acknowledged five cent discrimination was "competitively significant" (January 22 Tr. at 100), Mobil claimed that Tolokan could not have suffered any damages as a result of the proven discrimination since, for most of the damages period, Aldin, even though a favored purchaser, had sold its gasoline at retail at prices that were higher than those charged by Tolokan.

However, the uncontradicted evidence established that the substantially favored price afforded to Aldin provided it with great competitive marketing latitude, allowing Aldin to basically ignore customary price-volume considerations, while seeking to maximize its profit on each gallon of gasoline it sold by taking advantage of the substantial competitive discrimination. (January 15 Tr. at 186-187, 190-191; January 16 Tr. at 23.)

Because of the increased profit generated by the discrimination, Aldin was able to expend considerable sums remodeling its facility, including installation of desirable self-service facilities, and storage tank replacement. (January 16 Tr. at 11-12.)

To the contrary, because Tolokan was charged a substantially higher price over the entire damages period, the margins of net and gross profit which he was able produce were substantially less than Aldin's. As a result, Tolokan was unable to generate sufficient income to renovate his facilities, modernize his gasoline sales facility to include self-service, or install new underground storage tanks. (January 15 Tr. at 189; January 16 Tr. at 13.) Tolokan was also required to pay special heed to the customary retail price-volume interrelationship, which was basically ignored by Aldin as a favored buyer. (January 15 Tr. at 186-187, 190-191; January 16 Tr. at 13.)

The evidence further established that, if the wholesale prices which Mobil offered to Tolokan and

Aldin had been non-discriminatory, Tolokan would have also been able to compete effectively with the Aldin location, while providing a lower retail price to the public, thereby generally reducing the level of retail gasoline prices in Guilford, while significantly increasing his own volume and profitability. (E.g. January 15 Tr. (Professor Cotterill, Tolokan's expert economist) at 162-163, 178-180, 185-191; January 16 Tr. at 10-13, 18-23, 32-34; January 11 Tr. (Tolokan testimony) at 56-72; 78-79, 83-84, 88-89, 96-97, 100-102.)[6]

After the denial of Tolokan's Motion for Directed Verdict regarding Mobil's meeting competition defense, the jury found that Mobil's lower prices to Aldin were not cost justified (Verdict Form, App. B, Question 7),

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[6] Tolokan's expert utilized three separate theories establishing the existence and amount of damage. This resulted in alternative damage quantifications of $425,587.42, $462,000 and $889,000. The expert testified that he believed the lower of the three alternatives (comparison group method calculation) was the most accurate since it required the fewest hypotheticals and assumptions. (January 16 Tr. 34, 44-47, 181-182, 188; January 17 Tr. 33-48; Ex. 20.) This evidence was wholly uncontradicted.

that competition may have been harmed as a result of the different prices charged to Tolokan and to Aldin by Mobil (Verdict Form, App. B, Question 4), that the lower price offered to Aldin by Mobil was to meet the equally low price offered by Mobil's competitors (Verdict Form, App. B, Question 6), and that Tolokan had therefore not been injured in a way that violated the antitrust laws as a result of Aldin paying a lower price for gasoline (Verdict Form, App. B, Question 5). Pursuant to the Verdict Form, the jury did not determine whether or not Tolokan had been damaged by Mobil and, if so, in what amount. (Verdict Form, App. B, Question 8.)

B. BASIS OF FEDERAL JURISDICTION

The basis for federal jurisdiction in the court of first instance (District Court) was pursuant to 28 U.S.C. §1331, as a result of the "federal questions" arising under the *Robinson-Patman Act*, 15 U.S.C. 13(a) *et seq.* and Sections 4 and 6 of the *Clayton Act*, 15 U.S.C. §§ 15 and 26.

REASONS FOR GRANTING THE WRIT

I. MOBIL IS SEEKING TO AVOID THIS COURT'S HOLDING IN *TEXACO v. HASBROUCK, SUPRA,* BY ALLEGING A FACTUALLY UNSUPPORTABLE MEETING COMPETITION DEFENSE.

After this Court's holding in *Hasbrouck*, it became abundantly clear to refiners, including Mobil, that they would no longer be able to perpetuate their discriminatory pricing practices by arbitrarily establishing "classes of trade" which bore no relationship to functions actually performed by favored buyers, or to the value of those functions. Therefore, in an attempt to preserve its (and the petroleum industry's) condemned discriminatory pricing system, Mobil herein claims that its discriminatory pricing system "meets the competition", which competition consists of precisely the system condemned by this Court in *Hasbrouck* and *Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969), i.e. discounted prices given to favored purchasers who perform no functions.

It is to be expected that all refiners (and

discriminating sellers generally) will seek to avoid this Court's holding in *Hasbrouck* through this "meeting competition" artifice if Mobil's attempt is successful.

II. MOBIL'S MEETING COMPETITION DEFENSE IS NOT ESTABLISHED UNDER THE FACTS OF THIS CASE.

A party asserting the good faith meeting competition defense of 15 U.S.C. §13(b) has the burden of proof as to the existence of the defense. *Falls City Industries v. Vanco Beverage*, 460 U.S. 428, 438, 451 (1982). A discriminating seller must meet its burden of proving that it was possessed of facts based upon which it reasonably believed it was meeting the actual lower price of a competitor that was available to its favored buyer. *U.S. v. U.S. Gypsum*, 438 U.S. 422, 451 (1978).

In determining whether or not the meeting competition defense properly applies to an area-wide pricing system (such as Mobil used here), a discriminating seller must provide actual evidence to prove that it believed that the lower prices it charged to buyers were genuinely available to those buyers from its

competitors, throughout the territory, and throughout the period the lower prices were made available. *Falls City Industries, supra,* at 451. Mere vague assertions by a seller that it always sets prices so it is generally competitive in the market are insufficient. Where a discriminating seller has asserted a desire to meet competition generally, without reference to specific competitive price offers, the Courts and the Federal Trade Commission have rejected the meeting competition defense. *See, e.g. Rabiner & Jonstow, Inc. v. F.T.C.*, 386 F.2d 667, 671 (2d Cir. 1967), *cert. den.* 390 U.S. 1004 (1968); *Exquisite Form Brassiere, Inc. v. F.T.C.*, 360 F.2d 492, 493 (D.C. Cir. 1965), *cert. den.* 384 U.S. 959 (1966); *Foremost Dairies, Inc. v. F.T.C.*, 62 F.T.C. 1344, 1352 (1963), *aff'd* 348 F.2d 674 (5th Cir.), *cert. den.* 382 U.S. 959 (1965).

Where the only evidence adduced to support a claimed meeting competition defense is given by witnesses who are without personal knowledge of the transactions in question, and is limited to statements of

each witnesses' assumption or conclusion that the price discriminations were justified generally by competition, such evidence is insufficient to support a meeting competition defense. *Corn Products Refining Company v. F.T.C.*, 324 U.S. 726, 741 (1945).

Neither may a seller merely "bootstrap" itself into the protections of the meeting competition defense. Therefore, the law does not permit a seller to maintain an otherwise unlawful system of discriminatory prices merely because that pricing system has been adopted as a means of securing the benefits of a like unlawful system maintained by competitors. *Falls City Industries, supra,* at 440-441; *F.T.C. v. A.E. Staley Manufacturing Company*, 324 U.S. 1943 (1945).

Herein, Mobil has failed to identify any competitors, failed to identify any competitive offers, failed to identify any competitive prices which may have been available to its favored buyer at any point in time, and has conceded that it has never lost a distributor within the State of Connecticut to a competitor.

January 18 Tr. at 126.

Mobil's discriminatory pricing "system"[7] is therefore merely an attempt to perpetuate the discriminatory pricing system condemned by this Court in *Texaco v. Hasbrouck, supra*, and earlier in *Perkins v. Standard Oil Company of California supra*, under the guise of a meeting competition defense.[8]

Also, Mobil's evidence regarding its meeting competition defense was limited to unidentified "competition" claimed by Mobil to exist at the distributional/wholesale level. This was consistent with Mobil's claim that Aldin was a distributor, not a retailer. However, the jury found that Aldin was a *retailer, not a wholesaler.* Because Mobil has presented

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[7] A system whereby petroleum refiners throughout the industry charge those whom they arbitrarily categorize as "distributors" significantly lower prices than are charged to those categorized as "retailers".

[8] As was the case in both *Hasbrouck* and *Perkins*, the substantial discounts provided by Mobil to Aldin had nothing to do with any functions performed by Aldin, or to the value of any such functions.

no evidence whatsoever of competitive offers or competitive conditions regarding its "retail class of trade" purchasers (including Aldin), even the meager opinion evidence which Mobil did present was rendered irrelevant by the jury's finding.

Mobil's meeting competition defense was therefore unsupportable, and Tolokan's Motion for a Directed Verdict regarding that defense should have been granted, and the defense withdrawn from consideration by the jury. In failing to do so the District Court undermined the presumption of injury applicable in antitrust cases such as this and, consequently, Tolokan's right to recovery.

III. ANTITRUST INJURY IS PRESUMED TO HAVE OCCURRED WHERE COMPETITION IS KEEN, PROFIT MARGINS ARE SMALL, THE DISCRIMINATION IS RELATIVELY LARGE AND ADMITTED TO BE COMPETITIVELY SIGNIFICANT, AND THE DISCRIMINATION HAS EXISTED CONTINUALLY FOR MANY YEARS.

Tolokan and Aldin competed in the highly competitive retail gasoline marketplace where profits and margins were low, and pricing differences of a

penny or two were significant. The proven discrimination, averaging five cents per gallon over the damages period, was admitted by Mobil's expert to be "competitively significant". This proven substantial discrimination existed during the entire damages period from 1981 through 1988, ranging at times to as high as twenty-six cents per gallon. (P. Ex. 15, Prices of March 8, 1986.) Additionally, the jury found that competition had been injured, and that Tolokan and Aldin were in competition with each other. Where such a situation exists, the antitrust laws require that the existence of damages to a disfavored competitor be presumed. *Texaco, Inc. v. Hasbrouck, supra*, at 2551; *see also, F.T.C. v. Morton Salt*, 334 U.S. 37, 50 (1948), holding it to be "self evident" that injury occurs where manufacturers sell to some buyers substantially cheaper than to competing customers.

Additionally, where profits available to competitors are at a variance as a result of the discrimination, the evidence is sufficient to support a "just and reasonable

inference" of injury from proof of a defendant's wrongful acts and their tendency to injure plaintiff's business. *J. Truett Payne, Inc. v. Chrysler Motors Corporation*, 451 U.S. 557, 566 (1981) citing: *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946), awarding damages based on a comparison of profits available to a disfavored purchaser with profits available to a favored purchaser; *see also, Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 377-379 (1927); *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 561-566 (1931).

Because of the higher prices charged to him by Mobil, and as a matter of competitive necessity, Tolokan sold gasoline at full service (with resulting increased overheads) at, or below, the price which Aldin charged for self-service. Had Tolokan been afforded the pricing and profit opportunities Mobil afforded to Aldin, he could have lowered his price, generated additional profits and capital, modernized his facility, installed self-service equipment and new tanks,

etc., and thereby have become much more competitive and profitable. (January 11, 1991 Tr. at 67-72, 83-84; January 16, 1991 Tr. at 18-22; 186.)

Tolokan's expert confirmed the existence of competitive injury to Tolokan attributable to the discrimination, and reviewed the three alternative methods used by him to quantify Tolokan's damages. The expert (Economist Dr. Ronald Cotterill) opined that the comparison group method calculation, resulting in the most conservative damage figure of $425,587.42, was the preferable quantification method, since it required the fewest assumptions. (January 16 Tr. 34, 44-47, 181-182, 188; January 17 Tr. 33-48; Ex. 20.)

In such a case, where a buyer shows the price paid by him has been discriminatorily high, and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of *Clayton §4. Hanover Shoe v. United Machinery Corp,* 392 U.S. 481, 489 (1968).

IV. THE JURY'S FINDING REGARDING ANTITRUST INJURY TO TOLOKAN IS IRRECONCILABLE WITH ITS OTHER FINDINGS, MOBIL'S ADMISSION THAT THE DISCRIMINATION WAS COMPETITIVELY SIGNIFICANT, AND WITH THE PRESUMPTION AND PROOF OF ANTITRUST INJURY UNDER THE FACTS OF THIS CASE.

The jury found that Mobil's prices to Tolokan were discriminatory (Verdict Form, App. B, Question 1), that Tolokan and Aldin were in competition with each other (Question 2), and that, as a result, competition may have been harmed. The jury was then to determine whether ". . . *Mr. Tolokan was injured in a way that violates the antitrust law by Aldin paying a lower price for gasoline?*" The jury responded, "*No*"

However, this finding is logically irreconcilable with the jury's prior findings that competition was harmed as a result of the substantially different prices charged to Tolokan and to Aldin by Mobil, and that Tolokan and Aldin were in actual competition. Tolokan was certainly more directly in competition with

Aldin than were any other competitors since Tolokan and Aldin sold identical products to the public under the same "Mobil" tradename.

The jury's finding also contradicts the clear presumption of injury where competition is keen, profit margins are small, and the discrimination is large and has existed continuously for many years. Additionally, Mobil's own expert conceded that the discrimination was "competitively significant". Finally, Tolokan's expert evidence of injury, and quantification of that injury, was uncontradicted.

The only logical explanation for this contradiction in the jury's findings is that the jury was erroneously allowed to consider Mobil's unsupportable meeting competition defense. It was clear from the Court's instructions that, if the jury found the meeting competition defense to exist, the jury was to find that Mobil could not have violated the antitrust laws. The Court instructed the jury as follows in that regard:

> *"Defendant may, nevertheless, exonerate itself from liability by demonstrating by a*

preponderance of the evidence that its decision to charge Aldin a lower price was to meet competition." (E.R. p. 51, lines 3-7);

"*If you find that Mr. Tolokan has suffered an antitrust injury as a result of a violation of the antitrust laws and that Mobil has not proved that meeting the competition defense or the cost justification defense is available to them, the law provides that Mr. Tolokan should be fairly compensated for all damages to his business . . . .*" (E.R. p. 53, lines 17-24);

"*But you should also remember that you can compensate Mr. Tolokan only for antitrust injuries caused by a violation of the antitrust laws.*" (E.R. p. 54, lines 17-20). Emphasis added.

The Court therefore clearly instructed the jury that if Mobil established the defense of meeting competition it would have "exonerated itself" from antitrust liability, and that Tolokan could only be compensated for antitrust injuries caused by a *violation* of the antitrust laws.[9]

Having improperly found that Mobil's

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[9] The District Court further instructed the jury: "*You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole.*" E.R. 30, lines 5-7, *see also*, E.R. 32-33, lines 23-2.

discriminatory prices to Aldin were to meet competition, and having been instructed by the Court that Mobil had thereby exonerated itself from antitrust liability, it cannot logically be expected that the jury would have found that Tolokan had been injured in a way that *violated* the antitrust laws.

Conversely, had the Court properly removed the meeting competition defense from the consideration of the jury, and directed that such a defense was not available, nor to be considered, the jury's findings regarding Questions 1 through 4 would have allowed the appropriate determination by the jury as to whether or not Tolokan had been injured, i.e. was Tolokan damaged because he was required to pay an average of five cents more per gallon than was his competitor one mile away for nine years? Neither the jury nor Tolokan were afforded this opportunity as a result of the District Court's failure to withdraw the unsupportable meeting competition defense from the consideration of the jury.

In its affirming Opinion the Court of Appeals cites

to one portion of the Court's instructions regarding antitrust injury and affirmative defenses. However, in doing so it ignores completely the fuller content of the instructions clearly instructing the jury to *exonerate* Mobil of any antitrust violation if the meeting competition defense were sustained. The Appeals Court's finding that there was no basis for believing that the jury's finding of no antitrust injury was unduly influenced by the submission of the meeting competition defense is illogical, contrary to the jury's finding of competitive injury, contrary to the uncontradicted presumption of injury under the facts of this case, and contrary to Tolokan's uncontradicted evidence establishing and quantifying his damages. What the Court of Appeals is essentially saying is that the jury should have found that Mobil violated the antitrust laws, thereby injuring Tolokan, despite the fact that the jury had been instructed that Mobil was exonerated from any violation because of the meeting competition defense. Such a holding is illogical and

erroneous.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that a Writ of Certiorari be granted.

Dated this 6th day December, 1991.



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